**PUBLIC PROSECUTOR**

**v.**

**SAMER KLOM KLOM**

HIGH COURT BRUNEI DARUSSALAM
SIR DENYS ROBERTS CJ & HAYATI J
[CRIMINAL TRIAL NO. 3 OF 1995]
31 JANUARY 1996

***CRIMINAL LAW:*** *Penal Code - Sections 300 & 304 - Murder - Whether culpable homicide not amounting to murder - Whether deprived of self-control - Reasonable man test - Whether provocation grave and sudden - Whether means of retaliation reasonable.*

***CRIMINAL PROCEDURE:*** *Defence - Provocation - Exception 1 to s. 300 of Penal Code.*

***EVIDENCE:*** *Dying declaration - Evidence Act, 32(a) - Relevancy - Circumstances of the transaction - Narrow Interpretation - Evidence relating to act causing death - Wide interpretation - Evidence relating to reasons for act of killing.*

***EVIDENCE:*** *Burden of proof - Evidence Act, s. 105 - Burden of proving General Exceptions in Penal Code - Defence of provocation - Standard of proof.*

The defendant was charged with the murder of a girl under s. 300 of the Penal Code. Both the prosecution and the defence agreed to the following facts which were then tendered to the Court under s. 117C of the Criminal Procedure Code: (1) the defendant was found injured in a room together with the deceased; (2) the defendant inflicted or caused injuries to the deceased; (3) the knife found in the defendant's possession was the one that he used to inflict or cause injuries to the deceased.

The prosecution contended that it was a case of pre-meditated murder, and sought to admit the hearsay evidence of witnesses to the effect that the defendant had been threatening the deceased with a knife and had harassed her in various ways prior to her death. The Court, whilst ruling that such evidence would be admissible under s. 32 of the Evidence Act, thought that it was unnecessary to do so in the circumstances.

The defence contended that the defendant stabbed the deceased (and after that, himself) after he had lost his self-control. The defendant alleged that the deceased, who was his lover, had provoked him into stabbing her by rejecting him and telling him that she would rather die than go back to him.

The Court found that when the defendant stabbed the deceased (25 times), he intended to cause bodily injury to the latter, and that this was sufficient, in the ordinary course of nature, to cause death. The Court also found that the wounds inflicted by the defendant on the deceased were the cause of her death.

The only consequential issue before the Court was whether there was 'deprivation of the power of self-control by grave and sudden provocation' within the definition of Exception 1 to s. 300 of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder under s. 304 of the Penal Code.

**Held:**

**[1]** Homicide which would otherwise be murder is reduced to culpable homicide not amounting to murder if the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person of his self-control. In the context of provocation, reasonable man is defined as "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today."

**[2]** Although this was not a case of pre-meditated murder and the defendant did lose control of himself as a result of what the deceased said to him, a reasonable man of the community would not be so provoked by what had happened or been said as to lose control of himself. The rejection of a man by his mistress is not uncommon. It cannot, without more, constitute such a degree of provocation as would cause a loss of self-control in a reasonable man. What the deceased said to the defendant could not amount to 'grave and sudden' provocation.

**[3]** The means of retaliation used by the defendant was an unreasonable one in the circumstances, bearing in mind what the deceased had said to him. The defendant reacted to what the deceased said by using a knife, which is inherently lethal. He must have known that the repeated stab wounds were of a kind which would be likely to result in death.

**[4]** The prosecution has proven beyond a reasonable doubt that the defendant killed the deceased, and that the act which caused her death was murder as is defined in s. 300 of the Penal Code. The defendant has not succeeded in showing, on a balance of probabilities, that his conduct fell within Exception 1 to s. 300 of the Penal Code.

**[5]** Any statement by the deceased, if relevant to the circumstances of the transaction which resulted in her death, would be admissible. This meant that statements by the deceased as to the conduct of the defendant before

he attacked her might be relevant and admissible if they related to the circumstances of the transaction which resulted in her death.

**[6]** The burden of establishing the defence of provocation lies on the defendant, and the standard of proof required is that of the balance of probabilities.

*[Defendant guilty of murder and sentenced to death]*

**Cases referred to:**
*Yeo Hock Cheng v. Rex [1938] 7 MLJ E 104* ***(refd)***
*Chan Phuat Khoon v PP [1962] 28 MLJ 127* ***(refd)***
*Othman bin Ahmad v PP [1970] 2 MLJ 176* ***(cit)***
*Ikau Anak Mail v. PP [1973] 2 MLJ 153* ***(cit)***
*R v Camplin [1978] AC 705 14* ***(foll)***
*Lorenzus Tukan v. PP [1988] 1 MLJ 251* ***(foll)***
*PP v. Lasakke [1964] MLJ 56* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code (Cap 7) (Brunei), ss. 117(c)(1), 239
Evidence Act (Brunei), ss. 32, 105
Evidence Ordinance (Brunei), s. 14
Penal Code (Brunei), ss. 299, 300, Exception 1, 302, 304

*For the public prosecutor - Shazalee Rahayu*
*For the defendant - Chu Wee Ken*

## JUDGMENT

**Sir Denys Roberts CJ & Hayati J:**

Samer Klom Klom, ("the defendant") faced the following charge:

> That you on 8 January 1995 at about 9 a.m. at Room 304 Jubilee Plaza Hotel, Bandar Seri Begawan, Brunei Darussalam, did commit murder by intentionally causing the death of one Shilma A. Ismael and thereby you have committed an offence punishable under s. 302 of the Penal Code.

The charge was put to the defendant, who pleaded not guilty.

*The Law*

The prosecution must prove that the defendant is guilty of the offence charged beyond reasonable doubt. Throughout our judgment, if we express ourselves as satisfied or sure or say that something has been proved or that we have no doubt, we should be taken as intending, in each case, to mean that the fact has been proved beyond reasonable doubt by the prosecution, on which the burden lies throughout. We should add that the prosecution must prove, beyond a reasonable doubt, every element which is essential to a conviction under the relevant section of the Penal Code ("PC").

Section 300 of the PC sets out those occasions on which culpable homicide is murder:

> (a) if the act by which the death is caused is done with the intention of causing death; or
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
>
> (c) if it is done with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death or such injury as aforesaid.

There are exceptions, in that culpable homicide is not murder if the offender:

> (a) is deprived of the power of self-control by grave and sudden provocation; or
>
> (b) in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law; or
>
> (c) is a public servant, or is aiding a public servant, and exceeds the powers conferred upon him by law.

The only evidence which has been led of such a nature that the circumstances of this case could possibly fall within any of the exceptions to s. 300 PC, is that relating to provocation, which will be considered later.

Section 299 PC states that culpable homicide is committed by anyone who "causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death".

One of the elements of intention or knowledge specified in s. 299 PC must be present. Otherwise an act, even if criminal in nature and causing death, will not amount to culpable homicide. The burden of proving such intention or knowledge lies on the prosecution, which may for this purpose rely upon all the circumstances of the case.

The motive which incites the action is not relevant, if that act falls within the above definition and not within any of the general exceptions in the Penal Code. Nevertheless, the presence of a motive may be useful, as explaining an act which might otherwise seem to be inexplicable.

By charging murder, the prosecution must establish that the defendant is both guilty of culpable homicide and of that form of it which is described in the Penal Code as murder. If it fails to do so, the defendant cannot be found guilty of that offence.

We have summarized parts of the evidence of some witnesses in the appendix. This should not be regarded as indicating that we have only taken into account, in reaching our conclusions, that part of the evidence which is so summarized. We have given full and proper weight to all the admissible evidence put before us, both verbal and documentary, whether or not it has been referred to in the summaries.

Even though we may not have mentioned them specifically, we have also considered, and given appropriate weight, before reaching our conclusions, to any inconsistencies in the evidence of a witness and to any contradictions between the testimony of different witnesses.

*Statements*

At the outset of the trial, the defence indicated that none of the statements made by the defendant would be challenged. Therefore no *voire dire* was held.

We were satisfied that both of the statements concerned were accurate and voluntary.

Sgt 646 found the defendant lying on the floor of room 304 and heard him say "I want to die with this woman". The body of Shilma A. Ismael ("Shilma" or "the deceased") was lying beside him when he said this. This statement was recorded by the Sergeant in his sketch plan and in his notebook.

A statement after warning was taken from the defendant on 18 January 1994 by SI Ariffin. It was made in Thai and translated into Malay by Dy Maimung, a Thai interpreter, who was present throughout.

The statement made by the defendant was as follows:

> I have known Dy Shilma A. Ismael for more than 2 years. A year after I knew her, we became close like husband and wife. It was only in the month of December 1994 that I told my friends that worked in Jubilee Hotel. In the month of December, I did scold Dy Shilma A. Ismael because she went out with other man. I instructed her not to go out with other man or phone another man. But Dy Shilma did not want to follow what I said. Although Dy Shilma did not want to follow what I said but our relation was still as usual. One week before Dy Shilma A. Ismael died I was always giving advice to her. I did ask Dy Shilma A. Ismael if she was ashamed of being friends with me since I am already old that is 42 years of age and Dy Shilma A. Ismael 19 years of age. I also told Dy Shilma if she liked me, I would like to embrace (deletion/signed) Islam. Dy Shilma asked me (deletion/signed) that they have had sexual intercourse already and (deletion/signed) if

other man knew. (deletion) I (deletion/signed) was suspicious that she had other man (deletion/signed). During my friendship with Dy Shilma she often washed my clothes and cooked for both of us. On 8 January 1995 I worked at 8 in the morning and end of working hours at 5 in the evening. I worked in the maintenance section of the said hotel. Dy Shilma also worked at 8 (deletion) in the morning. At 9 in the morning, I was cleaning the Air-cond on the 3rd floor. Dy Shilma was cleaning the rooms on the 3rd floor as well. When Dy Shilma was cleaning room no. 304 and I was checking the Air-cond in room no. 304. In the said room I asked Dy Shilma to renew her friendship with me but she said she did not want, because she felt hatred. She also said that if it was renewed she would not agree and that death would be better. I had locked the door of the said room. Previously, why was she not ashamed, and now she is ashamed. When she said it is better to die, I also said I wanted to die. I straightaway stabbed my stomach on the right side with a knife that I used for doing work. I pulled out the knife and (deletion/signed) when I wanted to stab my body again Dy Shilma immediately prevented me and said don't don't and the knife hit her hand. Dy Shilma fell unconscious on the floor. I straightaway stabbed Dy Shilma's stomach area and after that I stabbed my own body and stabbed Dy Shilma's body and mine again. I stabbed her about **5** times and myself **7** times. I do not remember how long afterwards the police arrived and I was taken to hospital by an ambulance.

DSP Wahab, according to his evidence at the P.I., asked the defendant some questions on 8 January 1994 and recorded both the questions and the answers in his notebook. He read them to the defendant and invited him to sign them which Samer did. In the event, the prosecution did not produce these entries in evidence. We mention them because it seems to us to be an admirable practice, which should be generally followed by police officers investigating possible offences.

*The Background*

The defendant, Samer Klom Klom, came from Thailand. He is aged 42 and has a wife there. Shilma according to Samer was about 20 when she died on 8 January 1995. Her age is not certain, but she seems to have been about 20 years younger than Samer.

Both Samer and Shilma had worked for the Jubilee Hotel for at least 3 years. She lived in the hostel provided for the Hotel workers. He lived in a room on the seventh floor of the Hotel.

None of the other witnesses knew as to what relationship, if any, had grown up between Samer and Shilma. According to Samer, Shilma became his mistress about the end of 1992. We accept his evidence in this respect.

On 8 January 1995, both were working in the Hotel. Various witnesses, whose testimony we accept in this matter, have described how, for different reasons, they searched for both Samer and Shilma from about 0900 onwards.

They were later found by Sgt 646 in room 304, the two doors of which were both locked from the inside, lying together on the floor, in a pool of blood. The defendant held in his hand a knife which could have caused the various injuries which were found on Shilma's body, according to Dr Telisinghe, the specialist pathologist. When the police entered the room, Shilma was dead and Samer wounded.

*Agreed Facts*

Counsel for the Public Prosecutor and for the defence very properly agreed a number of facts. This agreement, which has rendered much evidence unnecessary and is to be recommended to other Counsel as a model to be followed, was signed by both Counsel and tendered to the Court under s. 117C of the Criminal Procedure Code (Cap 7).

Subsection (1) of this section provides that the admission by any party of a fact under s. 117C shall "as against that party be conclusive evidence in those proceedings of the fact admitted".

The agreement was as follows:

**Agreed Facts**

1. That on 8 January 1995 at about 9 a.m. in room 304 Jubilee Hotel the defendant was found injured in that room together with the deceased person.
2. That the defendant was taken to RIPAS Hospital.
3. That the defendant inflicted or caused injuries to the deceased.
4. The knife found in the defendant's possession by Sgt. 646 Hj Mohd Osmena is the one that he used to inflict or cause injuries to the deceased.

**Agreed Document**

The scientific report of a Mrs. Tan Wai Fun, Scientific Officer, Institute of Science and Forensic Medicine, Singapore is accepted and may be given in evidence pursuant to s. 308A of the Criminal Procedure Code.

*Death of Shilma A. Ismael*

Dr. Telisinghe, the forensic pathologist at RIPAS, went to room 304, about 12.30 on 8 January 1995 at the request of the police and examined the body of Shilma.

He estimated the time of her death at about 0900 to 1030 that morning. He carried out a full post-mortem examination of Shilma the following morning, 9 January 1995 at RIPAS, as a result of which he compiled a report, which

he produced in evidence as P9. The body of Shilma was identified to him by Hajjah Gaira bte Hj. Abd Ahmed, also known as Sandra, a friend of Shilma who also worked in the Hotel.

On examination, he found 8 abrasions or contusions on the face or upper arm and 25 incised wounds on Shilma's face, head, neck, chest, abdomen, left arm, left wrist and fingers, thigh and calf.

He certified the cause of death as shock following haemorrhage, secondary to multiple stab injuries. He thought that the 25 incised wounds on Shilma's body could have been inflicted by E23, which was the knife seen in the hand of the defendant by Sgt 646 when he entered room 304.

Dr. Telisinghe was of the opinion that any person who inflicted the large number of stab wounds, found by him on Shilma's body, must have intended to cause her bodily injury, and that the injuries were sufficient, in the ordinary course of nature, to cause death. Dr. Telesinghe, was of the opinion that the person who inflicted the wounds on Shilma probably did not intend to kill her, or to cause such bodily injury as the attacker knew was sufficient to cause death in the ordinary course of nature.

This is a merciful opinion, though the statement of Samer, that he thought "that Shilma wanted to die" was not put to Dr. Telisinghe.

We accept Dr. Telisinghe's opinion, that when Samer stabbed Shilma (as he admits that he did in the agreed facts) Samer intended to cause bodily injury to Shilma and that this was sufficient, in the ordinary course of nature, to cause death. In our view, the number of stab wounds inflicted on Shilma by Samer must lead to this conclusion.

There were 25 stab wounds found on Shilma's body. We accept Dr. Telisinghe's evidence that none of those were self inflicted and that nine of them were wounds which would, in the ordinary course of nature, have caused death. We also find that the wounds inflicted by Samer on Shilma were the cause of her death in room 304.

The prosecution has proved that Samer committed culpable homicide, amounting to murder, contrary to s. 300 of the Penal Code.

The report of Mrs. Tan (P3) a Scientific Officer from Singapore, was to the effect that the blood found on the knife (E23) contained blood both from Shilma and from Samer. This supports Samer's assertion that he stabbed himself as well as Shilma. The fact that he also stabbed himself does not, however, excuse him from the consequences of the acts which caused the death of Shilma.

*Admission of Evidence*

Witnesses spoke as to complaints made by Shilma, prior to her death, about the conduct of Samer in threatening her with a knife, threatening to kill her and harassing her in various ways.

Defence Counsel objected to the admissibility of this evidence, citing in support two Malaysian cases, *Yeo Hock Cheng v. Rex* [1938] 7 MLJ E 104 and *Chan Phuat Khoon v. PP* [1962] 28 MLJ 127.

In the *Chan* appeal, statements were made by a deceased woman, as to the defendant having carried out the abortion which caused her death.

The Malaysian Court of Appeal, when ordering a retrial, did not suggest that the evidence of the deceased woman was improperly admitted, but stated that the trial Judge had erred in not considering whether or not the credibility of the deceased could be relied upon.

We have considered the extent to which the various statements made by the deceased could be relied upon and have come to the conclusion that we should only regard her evidence as credible to the extent that it agrees, as it does in many respects, with the evidence given by the defendant himself.

In the *Yeo* appeal, heard by the Malaysian Court of Criminal Appeal, the deceased girl had made two statements, to her father and sister, on different dates. The first statement was made on 5 March 1937, and the second on 14 March 1937. The deceased was killed on 14 March 1937.

The Court rejected the earlier statement as inadmissible, on the ground that it was too remote and could not be regarded as one of the "circumstances of the transaction which resulted in the death" of the deceased. It admitted the second statement as material and as containing reference to such circumstances.

The evidence of a witness threatened by a defendant would be admissible under s. 14 of the Evidence Ordinance (Cap. 108) as showing the existence of a state of mind of a defendant, when the latter committed the offence charged against that person.

Such evidence would be highly relevant. The difficulty does not arise from the nature of the evidence, but from the method by which the prosecution seeks to prove it, namely by the adducing of hearsay evidence, that is to say by the statements of a deceased person. To justify this, the prosecution must show that s. 32 of the Evidence Act is in terms which will permit this evidence to be admitted. Section. 32 says:

> Statements, written or verbal, of relevant facts made by a person who is dead ... are themselves relevant facts in the following cases:

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

The Court in the *Yeo* appeal rejected the earlier statement, which contained a threat by the defendant to kill the deceased, on the ground that it was "too remote and cannot properly be treated as one of the circumstances of the transaction resulting in her death when other, and probably more cogent motives had intervened".

We accept that statements made by Shilma to other persons about Samer must fall under s. 32 of the Evidence Ordinance, if they are to be admissible.

We are satisfied that the motives which may have impelled Samer to kill Shilma are relevant, particularly so as his defence is that Shilma's conduct was such as to be the cause of his reaction to it.

The statements made by Shilma can be properly said, in our opinion, to be statements as to the cause of her death. They were, of course, made before the deceased had any reason to anticipate being killed.

If she is to be believed, her death was caused by the jealousy of Samer, expressed to her on a number of occasions and accompanied by threats some days before he killed her.

Could it be said that the evidence of other witnesses as to what the deceased had said to them falls within the phrase "any of the circumstances of the transaction which resulted in her death"?.

This would depend on whether a wide or a narrow construction is given to the phrase "circumstances of the transaction". It is narrowly construed, then evidence is only admissible under this head if it relates to the act which caused the death. This would exclude evidence of what the deceased said in the days before the transaction which resulted in her death.

If the phrase "circumstances of the transaction" is more widely construed, it could be said that this permitted hearsay evidence of not only the act of killing but of what lay behind it and the reasons for it.

It seems to us that it would be artificial, and often detrimental to a defendant, if a narrow construction were adopted.

We consider that any statement by the deceased, if relevant to the circumstances of the transaction which resulted in her death, is admissible. This means that statements by the deceased as to the conduct of Samer before he attacked her on 8 January 1995 may be relevant and admissible if they

relate to the "circumstances of the transaction which resulted in her death", since they explain Shilma's evidence as to the attitude of Samer, as he had expressed it.

We have therefore concluded that statements made by Shilma to various witnesses would be admissible under s. 32 of the Evidence Act. If we had relied on them, we should have considered the credibility of Shilma, who might have exaggerated, or been mistaken, in her reports to others of what Samer had said or done.

In fact, the admission of these statements has proved, in the event, to be unnecessary, since we will rely, in our decision, only upon evidence given by the defendant, on any statements which were made by Shilma or others in his presence or were confirmed by him in his statement to SI Ariffin.

*Finding*

We are satisfied, on the evidence, the admitted facts and the documents produced, that:

(a) Samer killed Shilma on 8 January 1995;

(b) that the killing took place in the Jubilee Hotel, room 304;

(c) that Shilma died between 0900 and 10.30 on 8 January 1995, from stab wounds inflicted by Samer;

(d) that Samer committed culpable homicide amounting to murder, as charged.

The remaining question is whether or not Samer was sufficiently provoked by Shilma to reduce the offence from one of murder (under s. 300 PC) to one of culpable homicide not amounting to murder (under s. 304 PC).

*Burden of Showing Provocation*

Section 300 PC defines murder. Exception 1 to that section is in these terms:

> Culpable homicide is not murder if the offender, while deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> Firstly }
>
> Secondly } not relevant to this case
>
> Thirdly }

Explanation. Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Section 105 of the Evidence Act (Cap.108) is in the following terms:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances.

The section does not specify what burden must be discharged, whether it is proof beyond reasonable doubt, a burden which the prosecution must satisfy, or the lesser burden of proof on a balance of probabilities.

There are, however, a number of Malaysian authorities, which we are content to follow (for example *Othman bin Ahmad v. PP* [1970] 2 MLJ 176 and *Ikau Anak Mail v. PP* [1973] 2 MLJ 153 to the effect that the burden of establishing the exception (which he will call "the defence") of provocation is that of the balance of probabilities.

If the Court is left in any reasonable doubt as to the circumstances giving rise to the defence, the benefit must be given to the defendant.

The final phrase of the section, that the Court shall presume the absence of such circumstances" emphasizes where the burden lies and makes it clear that, unless the existence of circumstances which give rise to an exception is raised by the defence, the Court should presume that they do not exist.

*Defence of Provocation - Requirements*

If the defence of provocation succeeds, and the prosecution has proved that culpable homicide amounting to murder has been committed, the offence will be reduced to culpable homicide not amounting to murder, contrary to s. 304 PC. Whether the offence will fall under the first or second part of that section will depend on the nature of the act by which the death is caused.

The defence of provocation will succeed if:

(a) the defendant was deprived of his power of self-control by the provocation;

(b) the provocation was grave and sudden;

(c) the defendant caused the death of the person who gave the provocation (or the death of any other person by mistake or accident, which does not apply here); and

(d) the means used by the defendant to retaliate are reasonable in view of the provocation offered.

Under (a) above, homicide which would otherwise be murder is reduced to culpable homicide not amounting to murder (the word "manslaughter" is a useful word to describe a killing under s. 304 PC, though the word is not used) if the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person of his self-control.

The act must be done while the person doing it is deprived of his self-control by provocation. Thus the deprivation of self-control must continue, in order to benefit a defendant who kills under circumstances of provocation, throughout the acts which caused the death.

The fatal act should be clearly linked to the passion which arises from the provocation. If the act was done after the passion has had time to cool, it is murder, even if the act were linked to the earlier provocation.

This means that if the attack was planned in advance, provocation would not serve as a defence, however grave the original provocation. Circumstances which induce a desire for revenge are not consistent with provocation, if the conscious formulation of a desire for revenge means that the defendant has had time to reflect. This would mean that the defendant has not suffered a loss of self-control as a result of the provocation which must be established if this defence is to succeed.

The reasonable man has been defined in *R v. Camplin* [1978] AC 705 14 as "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today".

The provocation must be such as will upset a person of ordinary sense and calmness, not one who is unusually sensitive or is hot tempered.

The test to be applied is the ordinary man of the community in Brunei from which the accused comes, in this instance the Thai community. This may mean that standards will vary among races, since some matters which are not particularly provocative in some communities may be serious insults to the members of another. We have heard no evidence to suggest that a reasonable man in Thailand will react in a different manner than would be expected of a reasonable man in Brunei.

This will sometimes mean that the Judges, if they come from different races or communities to the defendant, will be obliged, in the absence of evidence, to try to assess how a reasonable man of another race or community would react to a provocation offered to him. This cannot be any easy task, but it is one which Courts must undertake, to the best of their ability, as they are often obliged to assess the conduct of others whose reactions and backgrounds are markedly different from their own.

The test, therefore, under (a) above, is whether such a person, placed in the same situation as the accused would have been so provoked as to lose his self-control? See *Lorenzus Tukan v. PP* [1988] 1 MLJ 251.

Under (b) above, words and gestures can amount to grave and sudden provocation, such as will bring an act within the exception.

The mental background created by the previous conduct or words of the victim may also be taken into account in ascertaining whether a subsequent act could be said to have caused grave and sudden provocation.

This means that provocation can be cumulative (see *PP v. Lasakke* [1964] MLJ 56) in the sense that previous acts may bring a defendant to a point at which he loses control because the last act, though insufficient in itself, is the final straw which breaks the back of a camel which is already carrying a heavy load from previous provocations, though the final act of provocation must be of a nature which can reasonably be said to revive the earlier ones - e.g. a later reference to debt might revive earlier references to money, but it would not revive an earlier accusation of sexual inadequacy.

As to (c) above, we have found that Samer caused the death of Shilma, and that she was the person who delivered the "provocation" to him (assuming for this purpose that there was one).

As to (d) above, it is established that the means of retaliation should bear some relationship to the provocation, though it is not possible to say more than it should not be unreasonable, bearing in mind the gravity of the provocation - e.g. it would be wrong for a defendant to react to mild words by resort to a deadly weapon.

*Was this a Pre-meditated Murder?*

If Samer had planned the killing of Shilma in advance, there would have been a "cooling-off" period, after which the supposed provocation would no longer have been an excuse for the attack on Shilma.

The prosecution argued that there could not have been grave and sudden provocation because this was a planned murder by Samer, who had been brooding for some days over his rejection by Shilma, and that he had determined, in advance, that he would kill her.

Although Samer may have been upset by his rejection for some days, there is no evidence that this was a pre-meditated killing. The evidence of Samer himself, confirmed by his statement to SI Ariffin on 18 January 1995, is to the effect that Samer had known since December 1994 that Shilma had a new boyfriend and wished to have no more to do with him. If he had determined to kill her before 8 January 1995, the reasons to do so, must have been known to him well before the killing.

There is no suggestion in that statement that he had any intention of killing her before he entered room 304 on 8 January 1995. In his evidence, he denied any such prior intention. This we accept as true.

We comment that, if Samer had any prior intention of killing Shilma, it seems unlikely to us that he would have chosen so public a place as a Hotel room, at a time when he would probably be known to be there by various people.

We are satisfied that the "violent and vicious attack" (as Dr. Telisinghe described it) on Shilma was not due to premeditation on the part of Samer, but to a loss of his self control at the time.

*Summary of Defence*

There was no witness to the killing of Shilma by Samer, other than the latter though there was forensic evidence as to the nature of Shilma's injuries. It is therefore necessary, before deciding whether there was sufficient provocation, to consider his own account of what took place.

Samer gave evidence on oath. He was an evasive and unreliable witness, unwilling to answer questions which may have seemed awkward to him. We have not found it possible to accept his story in various respects.

In particular, wherever his version of events conflicts with that advanced by Dr Telisinghe, we prefer and accept the testimony of the doctor.

Samer testified that he had began an affair (involving sexual intercourse) with Shilma about the middle of 1992. He had sex with her in his room, or in one of the guest rooms of the Hotel.

When he had sex with Shilma, he told her that he loved her. She said that she loved him too. He went to the staff hostel each day, as Shilma helped him with his washing.

He had a quarrel with Shilma about the end of 1994 because he saw another man with her. He asked Shilma if she had a new boyfriend. She replied "he is just a friend". He did not believe her and admitted to Lau Siew Eng that he had acquired a bicycle, in order to ride to the hostel each evening to see if Shilma went out with her new boyfriend.

He asked her again, on 3 January 1995 whether she had met her boyfriend. Shilma replied that she had not been with him but had gone to the hairdresser. He did not believe her.

That day, in room 409, Sandra asked him what his relationship was with Shilma. He said they were like husband and wife.

When he later went downstairs to see Tony, the latter asked him why he had been upsetting Shilma. He denied doing so but said "ok" when Tony asked him not to do it again.

He last had sex with Shilma in December 1994 when she stopped coming to his room.

On 4 January 1995 Tony asked him "Have you been upsetting her again?". He replied that he had not and was only asking her for money. He told Tony "I still love Shilma. I want Shilma back again".

Tony told him to stay away from Shilma.

On 6 January 1995, he went to see Sandra, who gave him back the last of his loan to Shilma. Sandra said "Don't upset Shilma again". He told Sandra not to interfere and asked her why she was such a busybody.

On 8 January 1995 at breakfast, he told Shilma "I could not break off with you", to which she replied "I have broken off with you". Nurlida, known also as Ning, who was there having breakfast, told him "find someone else, she does not love you".

After breakfast, he carried out repairs to room 404. Then he went to room 304 where other repairs were needed. He found Shilma already in room 304, cleaning it.

He said "I still love you" to Shilma. She replied "I don't love you any more". He asked "why don't we come back together again?". She replied "No, I am ashamed".

He asked "Why now? Why not before?". Shilma said "I would rather die than come back to you".

He said "Is that true" and locked the door of room 304. He came back and said "do you want to die?". Shilma did not reply.

Samer was carrying a knife, which he used for repairs, in his back pocket. He took it out and used it to inflict stab wounds on Shilma.

He says that he stabbed his own stomach about twice. Shilma said "don't don't". He did not reply. Shilma tried to take away the knife. She stabbed herself in the stomach. He grabbed the knife and stabbed himself and Shilma. She did not say anything. She fell to the bed and then to the floor. He did not know how often he stabbed her.

She crawled to the side of the room where he joined her. She said "I love you". He replied "I love you too". She said "Let us swear to get married".

They put their arms round one another. Then he passed out.

In cross-examination, Samer confirmed that "things had changed" between him and Shilma after he had a quarrel with her.

In his statement he said that he had scolded Shilma because she had gone out with another man. He explained this by saying that he was not angry when he spoke to her but wanted her to know how he felt. He was not angry with her, but with himself as he loved her a lot.

He did not believe Shilma on 3 January 1995 (after she said she had been to the hairdresser). He just "felt normal", though he thought she was lying.

He agreed that he told Sandra that Shilma was "like my wife". He felt sadness when Tony told him that Shilma, who was there, did not want him any more. Tony also told him that Shilma looked on him as a father, to which he replied that Shilma should not have slept with him in the past, if she felt like that.

He felt sorry when he heard this. He last had sex with Shilma about the middle of December, when she stopped coming to his room. He had never believed that Shilma had lost interest in him.

On 6 January 1995, Sandra said to him, when she gave him RM200, "do not upset Shilma again". He told Sandra she was a busybody.

He agreed that he knew Shilma did not want him any more two weeks before she died. At breakfast, he said to Shilma "I could not break off with you", to which she replied "I have broken off with you". He agreed that he thought she meant it and that Ning said "Find someone else, she does not love you". He was not angry when Ning said this.

In room 304, he said to Shilma "I love you", to which she replied "I don't love you any more". He felt very sad when she said this. He was angry with himself. He did not ask her why.

He asked Shilma "why don't we come together again?". She answered "I would rather die than come back to you". When he heard her say "I'd rather die", he felt very sad. He thought only of himself not of her. He wanted to die.

He thought she wanted to die, though he did not know why. He asked her but she did not reply. She wanted to die in spite of having a new boyfriend. He thought that she wanted to die because her friends did not like her having a relationship with him. Perhaps she was depressed for this reason.

He felt that she wanted to die. He did not agree that he wanted to kill her or was angry with her from the time he heard about the new boyfriend.

He did not think of killing her before he went to room 304.

*a* He stabbed himself first. Then she grabbed the knife and stabbed herself once.

He locked the door of room 304 to the corridor because he did not want anyone to see him die.

When he asked Shilma if she wanted to die, he thought that he wanted to kill
*b* himself. He did not know if Shilma expected to be killed or not.

He did not know he had a knife in his back pocket. He took the knife out to kill himself, not Shilma.

He hit himself in the stomach. When Shilma said "don't don't" he did not
*c* know what she meant. He did not remember what happened at that time.

He thought Shilma stabbed herself on purpose. He stabbed her again after she fell down. He did not remember where he stabbed Shilma or how many times he stabbed her. He stabbed her when she was on the floor. He did not
*d* intend to kill her when he stabbed her.

There was no struggle in the room. Shilma got her bruises from crawling across the room. That is how the blood was spread about the room.

He stabbed her when she first fell down. Then he stopped. He did not stab
*e* her again. When he stabbed her, he thought she wanted to die because she had stabbed herself.

He did not mean to kill her. She said she wanted to die. He meant to die with her but he did not want to kill her.

*f* When lying at the suitcase, Shilma said "I love you. Let us swear to get married". He thought that she wanted to come back to him.

He did not call for help as he wanted to die. He did not call for help for her as he "was not thinking of anything at the time".

*g* He did not want her to die when he stabbed her. He wanted to die with her but he never thought he wanted to kill her.

He agreed that he knew for at least two weeks before Shilma died that she did not want him any more.

*h* He did not lose his temper with her in room 304. He felt sad with himself. He was not angry when he stabbed her.

When he inflicted 25 stab wounds on her, he was not angry with her.

He was not angry because she had rejected him. It was because he saw her
*i* stab herself and thought that she wanted to die like him, though he did not ask her why she wanted to die.

*Findings*

We find the following facts, in relation to the death of Shilma:

(a) Samer did lose control of himself as a result of what Shilma said to him. We believe that, as a result of Shilma's statement that she would rather die than go back to him, Samer lost his self control and attacked her. We do not accept his evidence that he was not angry with her, but only with himself;

(b) a reasonable man of the deceased's community would not be so provoked by what had happened or been said as to lose control of himself. The rejection of a man by his mistress is not uncommon. It cannot, without more, constitute such a degree of provocation as would cause a loss of self-control in a reasonable man. The prosecution has argued that there was no loss of self control. We do not accept that such a man would use a knife unless he had lost his self control. What she said to him made him angry and we reject his evidence that it only made him sad and angry with himself. He was angry with her, or he would not have attacked her. When Shilma said "I would rather die, than come back to you", Samer became angry, lost his self control and stabbed her;

(c) what Shilma said to Samer in room 304 could not amount to "grave and sudden" provocation of Samer, even if it revived in his mind several other rejections of him in the previous two weeks or so;

(d) when Shilma said that she would rather die than return to him, he decided to kill her not because she told him she wished to die, but because he had lost his temper and with it, his self control. We reject his evidence that, after he had stabbed her, she declared her love for him, when she had rejected him a few minutes before;

(e) Samer inflicted twenty five stab wounds on Shilma, of which nine were serious enough to cause death if not treated;

(f) Samer knew that, when he stabbed her, he was inflicting wounds which would be likely to kill her;

(g) we do not accept his evidence that Shilma stabbed herself. There was no reason why she should do so. He did not mention this in his statement;

(h) we accept the evidence of the pathologist that there was a struggle in the room. This opinion is supported by the eight bruises found on Shilma's body. We reject Samer's evidence that these marks were caused by Shilma crawling across the carpet. We have no doubt that they were sustained by Shilma in an unavailing effort to escape from him, as were the defensive wounds found on her body;

(i) Samer sustained seven stab wounds, none of which threatened his life. We accept that these were self inflicted, probably some time after he had stabbed Shilma and she had crawled to the suitcase at the side of the room, where she was found dead. These wounds cannot, since they were self inflicted, amount to a provocation or a justification of his conduct (though it might have been different if any of his wounds had been inflicted by Shilma);

(j) there was no evidence that Samer was affected by any mental condition, such as would mitigate or excuse his acts on 8 January 1995 in room 304;

(k) the defendant reacted to what Shilma said by using a knife which is inherently lethal. He must have known that the repeated stab wounds, which he inflicted on Shilma, were of a kind which would be likely to result in death. The means of retaliation used by the defendant was an unreasonable one in the circumstances, bearing in mind what Shilma had said to him.

In summary, this was an unhappy case of a middle aged man, who was unable to come to terms with his rejection by a young girl, who had a new boyfriend and wished to have nothing more to do with him. This does not justify what he did, but it does provide a motive, however weak, for his actions which would otherwise be inexplicable.

When she told him, in room 304, that she would rather die than go back to him, he lost his temper and his self control and launched a vicious attack on her, inflicting 25 wounds on her with a knife.

We find, as a fact, that there was no sufficient provocation of Samer to reduce this offence to culpable homicide not amounting to murder, under Exception 1 to s. 300 of the Penal Code.

*Conclusion*

The defendant faces the charge of culpable homicide amounting to murder, under s. 300 of the Penal Code.

We are satisfied that:

(1) The prosecution has proved beyond a reasonable doubt, that Samer killed Shilma A. Ismael on 8 January 1995 and that the act which caused her death was murder, as this is defined in s. 300 PC;

(2) The defendant has not succeeded in showing, on a balance of probabilities, that his conduct falls within Exception 1 to s. 300 PC;

The penalty for an offence against s. 300 of the Penal Code is prescribed by s. 302 PC itself. We are obliged to pass on the defendant a sentence of death, which we do now.

In accordance with s. 239 of the Criminal Procedure Code, we direct that the defendant shall be hanged by the neck until he is dead.

Reported by Gan Peng Chiang